



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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| Patent Application of | : | Dated: | 23 June, 2005 |
| Kintzele, G. et al | : | | |
| Serial No.: 10/670,623 | : | Group: | Art Unit 3632 |
| Filed: 25 September, 2003 | : | | |
| For: ELASTIC ARTICLE SUSPEN- | : | Examiner: | King, A. M. |
| SION DEVICE FOR INFANTS | : | | |
| | : | Action: | TRANSMITTAL |
| | : | | LETTER |

MAIL STOP APPEAL BRIEF - PATENTS
Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

Sir:

Enclosed herewith is appellants' Appeal Brief including
the Appeal Brief Filing Fee of \$250.00.

Respectfully submitted,

Ellen Reilly

By: Ellen Reilly
Registration No. 50,344
Attorney for Appellants
1554 Emerson Street
Denver, Colorado 80218
Area Code 303 839-8700

CERTIFICATE UNDER 37 C.F.R. 1.8

I hereby certify that the foregoing is being deposited
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22313-1451, this 23rd day of June, 2005.

Mary E. Robertson



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APPELLANTS' BRIEF ON APPEAL
TO THE
BOARD OF APPEALS

Ellen Reilly
Registration No. 50,344
Attorney for Appellants
1554 Emerson Street
Denver, Colorado 80218
Telephone (303) 839-8700
Facsimile (303) 830-2016



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MAIL STOP: APPEAL BRIEF - PATENTS
COMMISSIONER FOR PATENTS
P.O. Box 1450
ALEXANDRIA, VIRGINIA 22313-1450

Sir:

The real parties in interest in this appeal are Gregory and Lisen Kintzele, the applicants named above.

(1) RELATED APPEALS AND INTERFERENCES

To the best of Appellants' knowledge there are no other related appeals or interferences.

(2) STATUS OF CLAIMS

Claims 1 through 10 and 12 through 16 and 20 are rejected. Claims 11 and 17-19 have been canceled.

(3) STATUS OF AMENDMENTS

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A Request for Reconsideration was filed on January 24, 2005 subsequent to Final Rejection. An Office Communication was received on February 28, 2005. The Request for Reconsideration was considered but denied.

An amendment is filed contemporaneously with this Appeal Brief canceling claims 17 to 19. This amendment has not yet been considered by the Examiner.

(4) SUMMARY OF INVENTION

This invention relates to a device that restrains and allows for easy retrieval of toys and other articles from an infant table or seat.

In a first embodiment, as shown in Figure 1, the article suspension device 11 has a suspension member 21 forming a continuous encircling loop 13 at a first end 25 and an adjustable loop 31 including a slidable member 23, Figures 4A and 4B, secured at an opposite end 27. The suspension member 21 includes a length of elastic cord 19 that extends over the edge of a highchair 49 or stroller or the like. The suspension member 21 includes a length of elastic cord 19 which is covered with a cotton fabric covering 18 or waterproof fabric. When the loop 13 is attached to the highchair 49 or other stationary support for an infant, the covering 18 prevents the cord 19 from stretching beyond a certain desired point if objects are attached to the adjustable loop 31 or propelled or dropped from the highchair by the infant.

In an alternate form of suspension device shown in Figure 2, the continuous encircling loop 13 includes fastener 15 which may be comprised of a snap fastener, Velcro, a button or any other type of releasable fastening. Further, the encircling loop 13 may also include an eyelet opening member 14 which allows for attachment of a suction device 16. A carabiner 9 or similar type of encircling connector could also be substituted or attached to the encircling loop 13.

(5) ISSUES

A. Whether claims 1, 2, 5 through 7, 10, 12, 13, 15 and 20 are unpatentable under 35 U.S.C. §103 over Anderson in view of Dalmaso.

B. Whether claim 14 is unpatentable under 35 U.S.C. §103 over Anderson combined with Dalmaso and further in view of Gabriel.

C. Whether claims 3, 8, 9, 14 and 26 are unpatentable under 35 U.S.C. §103 over Anderson combined with Dalmaso and further in view of Giacona, III.

(6) GROUPING OF CLAIMS

If claim 1 falls, claims 2 and 5 through 7 and 10 would also fall. If claim 12 falls, then claims 13 and 20 would also fall. Claims 3, 4, 8, 9, 14 and 16 stand alone.

(7) ARGUMENT

(A) The rejection of claims 1, 2, 5 through 7, 10, 12, 13, 15 and 20 under 35 U.S.C. §103 as being unpatentable over Anderson (U.S. Patent No. 2,819,923) in view of Dalmaso (U.S. Patent No. 4,253,544). The Examiner has taken the position that U.S. Patent No. 2,819,923 to Anderson is analogous art rendering appellants' invention obvious in view of Dalmaso. Anderson describes an animal suspension sling having a flexible steel cable designed to be secured with a slip noose around an object at one end and attached at an opposite end to a carcass with a positioning device. The device is designed to securely suspend a carcass for cleaning or gutting.

Referring to the claims in issue, claim 12 is most representative and recites a device having an adjustable elongated single elastic cord with means at a first end for encircling a stationary object, an adjustable elastic loop at a second end, and a flexible cover member extending between the first and second ends for limiting the extent of stretch of the cord.

Referring specifically to the Examiner's rejection of claim 12, Anderson is not analogous art. A person of ordinary skill in the area of toy or infant tethers would not look to animal slings to solve the problems treated by appellants' invention. Preventing an infant from throwing toys and other articles on the floor and soiling them is a very different "field of endeavor" from securely suspending a carcass from a tree limb so that the carcass

may be gutted in a safe manner. Non-analogous art cannot properly be considered under 35 U.S.C. §103. In re Pagliaro, 210 USPQ 888, 892 (C.C.P.A. 1981).

Second, the Examiner argues that the animal suspension sling of Anderson, with the exception of the elastic cord, renders appellants' invention obvious. Anderson comprises encircling means for surrounding an object; an adjustable loop; a single length of a non-elastic cord is secured to the loop at one end and to the encircling means at a second end. The Examiner goes on to state that the cord in Anderson is constructed of a flexible material, such as, steel wire cable. "It would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified the material of the cord in Anderson to have been constructed of an elastic material for the purpose of providing an alternative, flexible, mechanically equivalent material for the cord based on the materials suitability for the intended use and since such a modification would not have produced any unexpected results." Office Communication, 10/22/2004, p. 2-3.

In response, it is submitted that it would not have been obvious under 35 U.S.C. §103 to substitute an elastic cord for a flexible steel cable and is still lacking an important element, namely, the cover. "The mere fact that references can be combined or modified does not render the resultant combination obvious, unless the prior art also suggests the desirability of the combination." In re Kotzab, 55 USPQ 2d 1313, 1318 (F. Cir. 2000). Without independent suggestion, the prior art is to be considered

merely inviting unguided and speculative experimentation which is not the standard with which obviousness is determined. Amgen, Inc. v. Chugai Pharmaceutical Co., Ltd., 18 USPQ 2d 1016 (Fed. Cir. 1991).

"Flexible" is defined under www.dictionary.com as "capable of being bent or flexed; pliable". "Elastic" is defined as "easily resuming original shape after being stretched or expanded; springy, rebounding". "Flexible" is very different from "elastic" and there would be a disincentive to substitute. Clearly, Anderson does not suggest or motivate an inventor to substitute an elastic material for the steel cable of Anderson. In Anderson, the purpose of the suspension sling is to rigidly support game and carcasses above the ground to facilitate cleaning and dressing and prevent other animals from reaching it. Substitution of an elastic cord would create an extremely unstable situation when gutting a carcass. It would also produce a seemingly inoperative device. Tec Air, Inc. v. Denso Mfg. Michigan, Inc., 52 USPQ 2d 1294, 1298 (Fed. Cir. 1999). Accordingly, there is no motivation or teaching to substitute an elastic cord. Further, substitution of an elastic cord in Anderson would destroy the intent, purpose or function of Anderson. The *prima facie* case for obviousness cannot be properly made. In re Gordon, 221 USPQ 1125 (Fed. Cir. 1984).

The Examiner also takes the position that it would have been obvious to modify the device in Anderson to include the cover as taught by Dalmaso for the purpose of providing a means for

providing shock absorption to the device. To establish a *prima facie* case of obviousness, one must show "some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine [or otherwise modify] the relevant teachings of the reference." **In re Fine**, 5 USPQ 2d, 1596, 1598 (Fed. Cir. 1988).

U.S. Patent No. 4,253,544 to Dalmaso discloses an energy-absorbing lanyard which has a warning flag attached for indicating the status of the lanyard. A section of the lanyard includes a load-bearing core 14 and a jacket 18 but the jacket does not limit te extension of the cord. Instead, an indicator flag is affixed to a gathered section of the jacket so that when force is applied to the lanyard, the jacket ruptures and the flag is freed from the jacket.

There is a clear lack of motivation to combine the cover as taught by Dalmaso with the device of Anderson. When dealing with a carcass, the cover would become covered with blood and other foreign matter and would not be practical in any way. One skilled in the art would not look to cover the steel cable of Anderson with a fabric covering. The Examiner states that it would have been obvious to modify the device in Anderson to have included the cover as taught by Dalmaso for the purpose of providing am eans for shock absorption to the device. The jacket 18 of Dalmaso does not provide shock absorpction for the lanyard. The core 14 is made from a synthetic, high tenacity or bulk continuous filament material, preferably nylon, having a predetermined tensile yield strength.

The core 14 provides shock absorption. The jacket only acts to allow for the flag to be freed. Further, shock absorption is not necessary in Anderson when using a steel cable. The Examiner concludes that if you substitute a stretchable cord in Anderson, then shock absorption becomes necessary. This is a double departure from Anderson and destroys the intent, purpose or function of the invention disclosed in the reference.

Finally, the combination and the cooperative relationship between the elastic cord and cover are critical to appellants' invention. The combination of Anderson with Dalmaso does not result in elements cooperating in the same manner as appellants' invention. The Examiner has failed to consider the combination and has impermissibly used "hindsight" by using the appellants' teaching as a blueprint to hunt through the prior art for the claimed elements and combine them as claimed. *In re Zurko*, 42 USPQ 2d 1476 (Fed. Cir. 1977).

Claim 1 is somewhat broader than claim 12 in that it does not specifically recite an elastic cord but does recite the stretchability of the cord and the cooperative relationship of the outer surrounding cover which stretches in response to stretching of the cord. For the reasons discussed with respect to the cooperative relationship between the cover and cord with respect to claim 12, it is submitted that claim 1 should similarly be allowable.

Claims 2 and 5 through 7 are dependent from claim 1 and

are urged to be allowable on the same grounds as presented in allowability of claim 1. Claims 13, 15 and 20 are dependent from claim 12 and are also urged to be allowable on the same grounds as argued with respect to claim 12.

(B) The rejection of claim 4 as being unpatentable over Anderson combined with Dalmaso and further in view of Gabriel. The Examiner has taken the position that Anderson combined with Dalmaso discloses the claimed invention except for the limitation of the encircling means being a carabiner. The Examiner cites Gabrief U.S. Patent No. 4,095,316, which is a simple carabiner, stating that "It would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified the encircling means in Anderson combined with Dalmaso to have included a carabiner as taught by Gabriel for the purpose of providing an alternative means for attaching the device to a stationary object having a different size and shape than that of the rod or bar." Office Communication, 10/22/2004, p. 4.

Once again, appellants reiterate the arguments made previously concerning the citation of Anderson and Dalmaso with respect to appellants' invention. There is no motivation or teaching in Anderson to suggest the use of a carabiner in securing the sling of Anderson to a stationary object. The small permanent loop 9 of Anderson is designed to be used as a common "slip noose", creating a tension sling for securely suspending a carcass and there is no teaching or suggestion of the use of a carabiner. The carabiner would necessarily have to be very large to accommodate

the circumference of the tree branch and would also be very difficult to install, the permanent loop of Anderson designed to be thrown over a tree branch in forming a slip knot.

Claim 14 is a dependent claim from claim 1 and for the reasons stated above, Anderson in view of Dalmaso do not render appellants' invention obvious. There is no motivation or teaching in Anderson or Dalmaso to include the carabiner of Gabriel.

(C) The rejection of claims 3, 8, 9, 14 and 16 as being unpatentable over Anderson in view of Dalmaso and further in view of Giacona, III. The Examiner has taken the position that Anderson combined with Dalmaso discloses the claimed invention except for the limitations of the base portion encircling means having a slidable gate. "It would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified the device in Anderson combined with Dalmaso to have included the snap fastener and adjusting means as taught by Giacona, III for the purpose of providing alternative, mechanically equivalent, and more efficient means for attaching the base portion and the free end portion of the encircling means together to form a loop and for easily adjusting the size of the elastic loop for accommodating objects having various sizes and shapes." Office Communication, 10/22/2004, p. 4-5.

Appellants again argue the inapplicability of Anderson and Dalmaso to appellants' invention, as set forth earlier. Giacoma, III (U.S. Patent No. 6,029,870) discloses a water bottle

holder having a double length of cord which enters the adjusting member for adjustment of the loop. First, there is no motivation or teaching in Anderson to suggest utilization of a snap fastener or releasable handle as taught by Giacoma, III. As set forth in Anderson, "As the full weight of the animal is imposed on the bight of the adjustable loop, the latter will tend to decrease in size, in accordance with the familiar principle of the slip noose." (Column 2, lines 33 through 36.) This is a tension sling and "the security with which the carcass is held increases with the imposition of increased load forces upon the suspension." (Column 1, lines 34 through 36.) The releasable handle or snap fastener taken from Giacoma, III would be contrary to the stated objectives of Anderson.

Second, Giacona, III possesses a double length of cord for the adjusting member. Appellants' invention only requires a single length of cord to pass through the adjusting member at one end as shown in Figure 3. The single cord of appellants' invention allows for a continuous loop to be formed from the suspension cord. This is very different from Giacona, III. Further, there is no motivation or teaching to suggest substituting the adjusting member of Giacoma, III. In evaluating patent references, the features disclosed therein must be ascertained as a whole. It is impermissible to ascertain visually what the applicant did and then view the prior art in such a manner as to select from the random features of the art only those which may be modified and then utilized to reconstruct based on appellants' invention. **Ex parte Clayton**, 205 USPQ 269 (Ct. App. 1979). It is impermissible to use

the claimed invention as an instruction manual or template to place together the teachings of the prior art to arrive at the claimed invention. One cannot use hindsight reconstruction. The Examiner is adding elements to the primary reference instead of modifying or substituting elements. The Examiner is clearly using hindsight to create appellants' invention, particularly where the primary reference (Anderson) is lacking all elements of the claimed combination of claims 1 and 12. Further, the adjusting member of Giacona, III is very different from appellants' adjusting member.

For these reasons, claims 3, 8, 9, 14 and 16 are also urged to be allowable based on the above arguments.

(8) CONCLUSION

There is a cooperative relationship between appellants' elastic cord and a cover that will limit the length of the extension or stretch of the cord and the elastic loop that is continuous with the cord. It is legally improper to focus on the obviousness of substitutions and differences between the claimed invention and the prior art rather than on the obviousness of the claimed invention as a whole relative to that prior art. Hybritic, Inc. v. Monoclonal Antibodies, Inc., 231 USPQ 81, (93 Fed. Cir. 1986), *cert. denied* 480 US 947 (1987).

The prior art cited by the Examiner, specifically the primary reference of Anderson is not analogous art and does not suggest the modifications to persons of ordinary skill in the art

much less the addition of a cover to limit the stretch of the cord which is lacking from Anderson alone or in view of Dalmaso. One asserting obviousness cannot pick and choose among individual elements of assorted prior art references to recreate the claimed invention; a challenger must show in the prior art some teaching or suggestion of the claimed combination of elements. **Symbol Technologies, Inc. v. Opticon, Inc.**, 935 F.2d 1569, 1576, 19 USPQ 2d 1241, 1246 (F. Cir. 1991).

Specifically in connection with Anderson, there is a complete lack of motivation or teaching to suggest to one of ordinary skill in the art to substitute an elastic cord or to add the cover of Dalmaso which doesn't even function in the same manner as appellants' cover. One would not look to Anderson as a primary reference to make appellants' invention nor would it have been obvious to substitute an elastic cord and then add a protective cover to arrive at appellants' invention. What has escaped the Examiner's attention throughout the prosecution of this application is the cooperative relationship between appellants' elastic cord and a cover that will limit the length of the extension or stretch of the cord.

Accordingly, the rejection of claims 1-10 and 12-16 and 20 as obvious in view of the cited prior art references is urged to be in error; for the reasons set forth above, allowance of these claims is respectfully requested.

An oral hearing is not requested.

Respectfully submitted,



Ellen Reilly
Registration No. 50,344
Attorney for Appellants
1554 Emerson Street
Denver, Colorado 80218
Telephone (303) 839-8700
Facsimile (303) 830-2016

CERTIFICATE UNDER 37 C.F.R. 1.8

I hereby certify that the foregoing Brief on Appeal is being deposited with the United States Postal Service as first class mail in an envelope addressed to MAIL STOP: APPEAL BRIEF - PATENTS, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22311-1450, this 23rd day of June, 2005.



See next page for Appendix

(9) APPENDIX

1. (previously presented) An article suspension device for infants, comprising:

encircling means for surrounding an object;

an adjustable elastic loop;

a single length of cord having a first end secured to said elastic loop and a second end secured to said encircling means; and

said cord includes a cover extending between said first end and said second end of said cord in outer surrounding relation to said cord, said cover being stretchable a predetermined distance between a retracted position and an extended position in response to stretching of said cord.

2. (original) A device according to claim 1 wherein said encircling means comprises a free end portion releasably secured to a base portion of said encircling means.

3. (previously presented) A device according to claim 2 wherein said free end portion is secured to said base portion with a snap fastener.

4. (original) A device according to claim 1 wherein said encircling means comprises a carabiner.

5. (previously presented) A device according to claim 1 wherein said elastic loop is formed as a continuation of said

cord.

6. (original) A device according to claim 1 wherein said elastic loop includes means for adjusting a length of said loop and said cord.

7. (previously presented) A device according to claim 6 wherein said adjusting means is defined by a body member having a first material-receiving slot and a second material-receiving slot, said first material-receiving slot extending along a parallel axis with said second material receiving slot.

8. (original) A device according to claim 7 wherein said adjusting means further includes a slidable gate normally urged to a closed position by a spring member.

9. (original) A device according to claim 8 wherein a combination of said slidable gate in an open position and said spring form an unobstructed passage through which said length of cord may pass.

10. (original) A device according to claim 1 wherein said cord includes elastic.

11. (canceled)

12. (previously presented) An article suspension device for infants, comprising:

an adjustable elongated single elastic cord having means at a first end for encircling a stationary object;

an elastic loop at a second end of said cord including a slidable member affixed to one end of said elastic loop and including means for releasably engaging said cord whereby to adjustably encircle an article inserted in said loop; and

a flexible cover member extending between said first end and said second end in outer surrounding relation to said cord, said cover being stretchable a predetermined length between a retracted position and an extended position thereby limiting the extent of stretch of said cord.

13. (previously presented) A device according to claim 12 wherein said encircling means includes a securing member for detachably securing said cord to a stationary object.

14. (previously presented) A device according to claim 13 wherein said securing member includes a releasable handle.

15. (previously presented) A device according to claim 12 wherein said means for releasably engaging said cord includes a clamping member for securely engaging a length of said cord.

16. (previously presented) A device according to claim 12 wherein said means for releasably engaging said cord includes a body member with a single material-receiving opening at a first end and a slidable gate.

17. (canceled)

18. (canceled)

19. (canceled)

20. (previously presented) A device according to claim 12 wherein said cover member includes a fabric sleeve.